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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 630

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY AND FRANK DEMPSEY, FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER PATROLMEN, SERGEANTS AND TURNKEYS OF THE METROPOLITAN POLICE FORCE OF THE CITY OF ST. LOUIS, SIMILARLY SITUATED, *Appellants,*

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN AND ALOYS P. KAUFMANN, CONSTITUTING THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, *Appellees*

STATEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MISSOURI.

(a)

The Statutory Provision Believed to Sustain the Jurisdiction

Appellants contend that the Supreme Court of the United States has jurisdiction of this appeal under Section 237(a)

of the Judicial Code of the United States, as amended, being Section 344(a) of Title 28 of the United States Code Annotated, which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. (Now by appeal instead of writ of error under the Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, Sec. 861a of Title 28, U. S. C. A.)

(b)

The Order of the State, the Validity of Which Is Involved

This appeal involves the validity of Rule 23, Section 342 of the Manual of Rules and Regulations for the Government and Discipline of the Metropolitan Police Department of the City of St. Louis, adopted on the 28th day of December, 1928 by the Board of Police Commissioners of the City of St. Louis, and reading as follows:

> "342. Other Organizations Forbidden—All members and employees of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employes other than the Police Relief Association, the Police Funeral Association and the St. Louis Police Pension Fund Association, each of which has been duly authorized to perform certain necessary functions."

The Board of Police Commissioners of the City of St. Louis was established under the provisions of the Statutes of the State of Missouri now contained in Sections 7689 to 7712 of the Revised Statutes of Missouri, 1939, and the Manual of Rules and Regulations for the Government and Discipline of the Metropolitan Police Department of the

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City of St. Louis, of which Rule 23, Section 342, is a part, was adopted by said Board of Police Commissioners purportedly under the authority conferred upon it by what is now Section 7695 of the Revised Statutes of Missouri, 1939, which provides, among other things, that said Board of Police Commissioners is authorized to make all such rules and regulations, not inconsistent with Article 26 of Chapter 38 of the Revised Statutes of Missouri, 1939, or other laws of the State, as they may judge necessary, for the appointment, employment, uniforming, discipline, trial and government of the police.

(c)

The Date of the Judgment Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final judgment here sought to be reviewed was entered by the Supreme Court of the State of Missouri on November 10, 1947, and appellants' motion for a rehearing was overruled December 8, 1947.

The petition for appeal herein was presented and filed on the 22nd day of January, 1948.

(d)

The Nature of the Case and the Rulings of the Court Bringing the Case Within the Jurisdictional Provision Relied On.

This suit was instituted in the Circuit Court of the City of St. Louis, Missouri, as a class action by five patrolmen and four sergeants, members of the Metropolitan Police Force of the City of St. Louis, by and on behalf of themselves and all other patrolmen, sergeants and turnkeys of the Metropolitan Police Force of the City of St. Louis similarly situated, for a declaratory judgment to the effect that Rule 23, Section 342 of the Police Manual adopted by the

Board of Police Commissioners of the City of St. Louis, set forth in subparagraph (b) hereof, prohibiting the members of the force from becoming members of a union of members, is unreasonable, arbitrary, illegal, unconstitutional and void, and that plaintiffs and the others on whose behalf the suit was brought are not subject to disciplinary action for violation of the rule. Plaintiffs further asked for a permanent injunction enjoining the defendants from instituting disciplinary action against plaintiffs and those on whose behalf the suit was brought, and from otherwise enforcing the rule.

Plaintiffs alleged in their petition the adoption of the rule in question by the Board of Police Commissioners on December 28, 1928; that on October 20, 1945 certain patrolmen and other members of the Police Force had organized Local No. 549 of the American Federation of State, County and Municipal Employees, a labor union, affiliated with the American Federation of Labor; that on November 29, 1945 the defendants adopted a resolution to the effect that Rule 23, Section 342 is valid and should be vigorously enforced, and providing that statements in writing must be filed by all members and employees of the Police Force by midnight, December 5, 1945, stating whether or not they had resigned from membership in said union, or in case they had applied for membership whether they had withdrawn their applications for membership in said union; that plaintiffs and other members of the Police Force, who were members of Local No. 549, had refused to resign from said local, and that if Rule 23, Section 342 was valid they are subject to disciplinary action for violation thereof by reason of having become members of said local and having refused to resign as members thereof; that charges were preferred and heard by defendants against certain patrolmen who were officers of Local No. 549 for violation of Rule 23, Section 342, and said patrolmen were dismissed from the Police Force of the

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City of St. Louis on December 19, 1945 for having participated in the organization of said union.

It was alleged in the petition that the charter granted to Local No. 549 by the American Federation of State, County and Municipal Employees provided that said charter was issued with the understanding of the parties that it would be revoked immediately if the members of Local No. 549 should call or participate in a strike or refuse to perform their duties as Police Officers; that the constitution adopted by Local No. 549 contained provisions to the effect that the oath taken by members of the union on becoming members of the Metropolitan Police Force should be superior to any obligation of the members to the local union or the American Federation of State, County and Municipal Employees or to any other organization, and that all members of the local union were obliged at all times to perform their duties as members of the Police Force diligently and faithfully, without partiality or prejudice, and that no amendment of the constitution could be made to authorize the members of the local union to strike or to threaten to strike, or so as to place the obligation of the members of the local union to the local union or to the American Federation of State, County and Municipal Employees or to any other organization before their obligations and duties as members of the Police Department.

Appellants in their petition contended that the rule was void because of unreasonableness, and because it violated certain sections of the Constitution of the State of Missouri, and also contended that the rule was invalid on the ground that it was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and to the First Amendment to the Constitution of the United States (Tr. pp. 14, 15)[1] in that (1) it abridged the privi-

[1] References are to pages of printed transcript filed in Supreme Court of Missouri.

leges and immunities of plaintiffs and the other members of the Police Force on whose behalf the suit was brought as citizens of the United States, in that it abridged the freedom of speech of plaintiffs and such other members of the Police Force, and abridged their right peaceably to assemble and to petition the government for redress of grievances, (2) it deprived plaintiffs and the other members of the Police Force on whose behalf the suit was brought of their right to liberty and property without due process of law in that said rule denied them their right of freedom of speech, and their rights peaceably to assemble and to petition the government for redress of grievances guaranteed to all persons by the First Amendment to the Constitution of the United States, and deprived them of their liberty to organize and become members of an organization for the purpose of bettering their working conditions and remedying grievances in connection with their employment, and (3) it denied to plaintiffs and the other members of the Police Force on whose behalf the suit was brought the equal protection of the laws in that plaintiffs and such other members of the Police Force were discriminated against by denying to them the right of freedom of speech and the right to peaceably assemble and to petition the government for redress of grievances guaranteed to all persons by the First Amendment to the Constitution of the United States, and by denying them the right to organize and become members of an organization for the purpose of bettering their working conditions and remedying grievances in connection with their employment.

Defendants' motion to dismiss plaintiffs' petition was sustained by the trial court (Tr. p. 20),[2] and plaintiffs appealed to the Supreme Court of the State of Missouri, which

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[2] References are to pages of printed transcript filed in Supreme Court of Missouri.

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reversed the judgment of the trial court and entered a declaratory judgment that the rule was not invalid, and did not conflict with the constitutional provisions relied upon by appellants, and that the enforcement of the rule as threatened, would not invade the constitutional rights of appellants as claimed, and that appellants were subject to disciplinary action thereunder.

(c)

Cases Believed to Sustain the Jurisdiction

The following decisions are believed to sustain the jurisdiction of the Supreme Court of the United States on appeal to review the judgment of the Supreme Court of the State of Missouri in this cause. These cases hold that the phrase "statute of any state" as used in Section 237a of the Judicial Code, providing that a final judgment and decision in any suit in the highest court of the state in which a decision in the suit can be had, where is drawn in question the "validity of a statute of any state," on the ground of repugnancy to the Constitution, treaties, or laws of the United States, may be reviewed by the Supreme Court of the United States, is not limited to acts of state legislatures, but includes every act legislative in character to which the state gives sanction, and that an order of a state commission or board made in the exercise of delegated legislative authority is a "statute of the state" for the purpose of Section 237a of the Judicial Code.

Hamilton v. *Regents of the University of California*, et al, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197;

John P. King Manufacturing Company v. *City Council of Augusta*, 277 U. S. 100, 72 L. Ed. 801, 48 S. Ct. 489;

Sultan Railway & Timber Company v. *Department of Labor & Industries of the State of Washington*, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505;

Live-Oak Water Users' Association v. *Railroad Commission of the State of California*, 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149;

Lake Erie & Western Railroad v. *State Public Utilities Commission of Illinois Ex rel. Cameron*, 249 U. S. 422, 63 L. Ed. 684, 39 S. Ct. 345;

Bluefield Water Works and Improvement Company v. *Public Service Commission of the State of West Virginia*, 262 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675.

(f)

Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The question presented on this appeal is whether Rule 23, Section 342 of the Police Manual is invalid as being repugnant to the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States because it denies appellants and other members of the Police Department of the City of St. Louis the rights of freedom of speech and freedom of assembly and petition, and because it deprives them, without due process of law, of their liberty to become members of a labor union.

It is contended by appellants that this question is substantial and debatable, and is of such character that it should be determined by the authoritative decision of the Supreme Court of the United States, and that a decision of this question is of great importance, not only to appellants and the others on whose behalf this suit is being prosecuted, who are or wish to become members of Local No. 549 of the American Federation of State, County and Municipal Employees, but also to members of other similar unions of police and law enforcement officers throughout the United States.

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It is appellants' contention that the union involved in this case is no more than a group of individuals who happen to be policemen employed in the Metropolitan Police Department of the City of St. Louis, and who wish to assemble together for the more effective exercise, through joint action, of the constitutional rights to which each American citizen is entitled. Congress is forbidden by the First Amendment to the Constitution of the United States to make any law abridging the freedom of speech or the right of the people peaceably to assemble and to petition the government for redress of grievances. This Amendment, while by its terms originally intended as a restriction only on the power of Congress and not upon the power of the States, is now, by virtue of the due process clause of the Fourteenth Amendment, applicable to the States. *Thornhill* v. *State of Alabama,* 310 U. S. 88, 84 L. Ed. 1093, l. c. 1098, 60 S. Ct. 784.

Therefore, the Constitution of the United States forbids the State of Missouri, through any of its agencies, from infringing upon and restricting the exercise of the basic fundamental civil rights of freedom of assembly and freedom of speech. The meeting and joining together of individuals into labor organizations and the carrying on of a common consultation for mutual aid in economic matters has long been held to be no more than an exercise of the rights of assembly and speech protected under the First Amendment to the United States Constitution. *State* v. *Butterworth,* 104 N. J. L. 549, 142 Atl. 57, 58 A. L. R. 744. Labor unions constitute assemblage for common conference and action on a variety of subjects; political, legislative, economic and social. Each of these types of purposes and objectives fall within the protective sphere of constitutional rights. As stated by Justice Jackson in *Douglas* v. *Jeannette,* 319 U. S. 157, 87 L. Ed. 1324, l. c. 1337, 63 S. Ct. 877:

> "In my view the First Amendment assures the broadest tolerable exercise of free speech, free press, and

free assembly, not merely for religious purposes; but for political, economic, scientific, news, or informational ends as well."

The United States Supreme Court held in *Whitney* v. *California,* 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641, that fear of serious injury cannot alone justify suppression of free speech and assembly, and that in order to justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced, and there must be reasonable ground to believe that the danger apprehended is imminent and the evil to be prevented is a serious one.

In *De Jonge* v. *Oregon,* 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255, it was held that freedom of speech is a fundamental right which is safeguarded by the due process clause of the Fourteenth Amendment to the Federal Constitution, and that the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental; that the right of free speech is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of civil and political institutions, principles which the Fourteenth Amendment embodies in the general terms of its due process clause, and that while the people, through their legislatures, may protect themselves against abuses of the rights of free speech or assembly, the legislative intervention can find constitutional justification only by dealing with the abuse, and that the rights themselves must not be curtailed.

It was held in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, l.c. 639, 87 L. Ed. 1628, 63 S. Ct. 1178, that it was important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own

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sake; that the test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved; that the right of a State to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting, but that freedoms of speech and of press and of assembly may not be infringed on such slender grounds, and are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

The Supreme Court of the United States, in the case of *Thornhill* v. *State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, again said that it is imperative that when the effective exercise of the rights of freedom of speech is claimed to be abridged that the Court should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations.

In *Thomas* v. *Collins*, 323 U. S. 516, 89 L. Ed. 430, 65 S. Ct. 315, the Supreme Court of the United States held that any attempt to restrict the liberties of speech and assembly must be justified by clear public interest threatened, not doubtfully or remotely, but by a clear and present public danger, actual or intended, more being required by way of connection between the remedy provided and the evil to be curbed than is necessary to support legislation under the due process clause. It was further held in this case that the grievances for the redress of which the right of petition and assembly is insured under the First Amendment are not solely religious or political ones, but include economic grievances, and that the problem of where the line shall be drawn in permitting restrictions on the right of free speech and free assembly is, although in the first instance for the legislative body, a question which the Supreme

Court of the United States must answer independently in the light of constitutional tradition, whatever the legislative judgment may be, and that the right to discuss and inform people concerning the advantages and disadvantages of labor unions and of joining them, is protected, not only as a part of free speech, but as a part of free assembly.

Appellants contend that there is nothing in the record in this case which discloses that restriction of the rights of freedom of speech and freedom of assembly of appellants and the other persons on whose behalf this suit is being prosecuted was necessary to prevent grave and immediate danger to the citizens of the State of Missouri and of the City of St. Louis. Appellants respectfully submit that the question as to whether the Board of Police Commissioners of the City of St. Louis, acting under a grant of legislative authority to make rules and regulations for the government and discipline of the Police Force, delegated to it by the legislature of the State of Missouri, may adopt and enforce a rule prohibiting members of the Police Force from joining a union under penalty of dismissal, thereby preventing them from effectively exercising their rights of freedom of speech and of assembly guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States, is a substantial one which should be decided by the Supreme Court of the United States.

Furthermore, aside from the infringement of appellants' rights of freedom of speech and of assembly, there is a substantial question, which should be decided by the Supreme Court of the United States, as to whether the rule adopted by the Board of Police Commissioners deprives appellants and others, without due process of law, of their liberty to become members of a labor union, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Grosjean* v. *American Press Company*, 297 U. S. 233, 234,

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80 L. Ed. 660, 665, 56 S. Ct. 444, in speaking of the Fourteenth Amendment, said that the word "liberty" contained in that Amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all of his faculties as well. In *Allgeyer* v. *State of Louisiana,* 165 U. S. 578, 589, 41 L. Ed. 832, 835, 17 S. Ct. 427, the Supreme Court of the United States said that the "liberty" mentioned in the Fourteenth Amendment means not only the right of a citizen to be free from the mere physical restraint of his person, but also the right of a citizen to be free to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion such purpose.

It was held in *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, and *Amalgamated Utilities* v. *Consolidated Edison Company,* 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561, that the right of employees to organize is a fundamental right not created by any provision of the National Labor Relations Act. Appellants submit that there is a substantial question which should be determined by the Supreme Court of the United States as to whether Rule 23, Section 342 of the Police Manual deprives appellants and other members of the Police Department of this right without due process of law, and whether this right to join a labor union is part of that liberty of which they may not be deprived without due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Appellants submit that the questions raised by this appeal are substantial and warrant the authoritative determination thereof by the Supreme Court of the United States.

(g)

Stage of Proceedings and Manner in Which Federal Questions Were Raised and Passed On in the Circuit Court of the City of St. Louis, and in the Supreme Court of Missouri.

The federal questions sought to be reviewed on appeal by the Supreme Court of the United States were first raised in the Circuit Court of the City of St. Louis, the court of first instance, by the petition for a declaratory judgment filed by appellants herein as a class suit for and on behalf of themselves and all other patrolmen, sergeants and turnkeys of the Metropolitan Police Force of the City of St. Louis similarly situated. The allegations of this petition have been summarized under sub-paragraph (d) of this statement. Appellants contended in this petition (Tr. pp. 2-19) [3] that Rule 23, Section 342 of the Police Manual, quoted verbatim under sub-paragraph (b) of this statement, was unreasonable, arbitrary, unconstitutional and void on certain grounds specified in sub-paragraphs 1 to 10 of paragraph XIII of said petition, sub-paragraphs 8, 9 and 10 being federal grounds and reading as follows (Tr. pp. 14 and 15): [4]

> "(8) That Rule 23, Section 342 of the Police Manual is an unconstitutional, illegal, unreasonable and arbitrary abridgment of the privileges and immunities of citizens of the United States contrary to Section 1 of Amendment XIV to the Constitution of the United States, in that Rule 23, Section 342 of the Police Manual abridges the privileges and immunities of plaintiffs and the other patrolmen, sergeants and turnkeys on whose

[3] References are to pages of printed transcript filed in Supreme Court of Missouri.

[4] References are to pages of printed Transcript filed in Supreme Court of Missouri.

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behalf this suit is being prosecuted, as citizens of the United States under the First Amendment to the Constitution of the United States, in that it abridges the freedom of speech of plaintiffs and such other patrolmen, sergeants and turnkeys, and abridges their right peaceably to assemble and to petition the government for redress of grievances.

"(9) That Rule 23, Section 342 of the Police Manual is an unconstitutional, illegal, unreasonable and arbitrary deprivation of plaintiffs and the other patrolmen, sergeants and turnkeys on whose behalf this suit is being prosecuted, of their right to liberty and property without due process of law, in violation of Section 1 of Amendment XIV to the Constitution of the United States, in that Rule 23, Section 342 of the Police Manual denies them their right of freedom of speech and their rights peaceably to assemble and to petition the government for redress of grievances guaranteed to all persons by Amendment I to the Constitution of the United States, and deprives them of their liberty to organize and become members of an organization for the purpose of bettering their working conditions and remedying grievances in connection with their employment.

"(10) That Rule 23, Section 342 of the Police Manual is an unconstitutional, illegal, unreasonable and arbitrary denial to plaintiffs and the other patrolmen, sergeants and turnkeys on whose behalf this suit is being prosecuted, of the equal protection of the laws contrary to Section 1 of Amendment XIV of the Constitution of the United States, in that plaintiffs and such other patrolmen, sergeants and turnkeys, are discriminated against by denying to them the right of freedom of speech and the right peaceably to assemble, and petition the government for redress of grievances guaranteed to all persons by Amendment I to the Constitution of the United States, and by denying them the right to organize and become members of an organization for the purpose of bettering their working con-

ditions and remedying grievances in connection with their employment."

Defendants filed a motion to dismiss this petition on the grounds that the court had no jurisdiction over the subject matter of the action; that it appeared from plaintiffs' petition that there existed no actual, justiciable controversy between the plaintiffs and defendants; that the petition did not state facts sufficient to entitle plaintiffs to relief and that it appeared from plaintiffs' petition that plaintiffs had failed to state a claim upon which relief could be granted (Tr. pp. 19 & 20).[5] This motion was sustained by the Circuit Court of the City of St. Louis (Tr. p. 20).[5]

Appellants duly appealed to the Supreme Court of the State of Missouri where they again raised these federal questions under points V and VI of their "Points Relied Upon" in their brief filed in the Supreme Court of Missouri, which points read as follows (Statement, Brief, and Argument of Appellants, pp. 24-25-26):

"V.

"The trial court erred in sustaining respondents' motion to dismiss appellants' petitions because the petition did allege sufficient facts to show that Rule 23, Section 342 of the Police Manual is unconstitutional as denying appellants and other members of the police department the rights of freedom of speech and freedom of assembly and petition contrary to Sections 8 and 9 of Article I of the Constitution of Missouri, and contrary to the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"(a) The appellants and other members of the police department had the right to join a labor union, at meet-

[5] References are to pages of printed Transcript filed in Supreme Court of Missouri.

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ings of which they might assemble and exercise their right of freedom of speech to discuss matters affecting their employment. The rights of freedom of assembly and freedom of speech are fundamental rights guaranteed to all persons by the First and Fourteenth Amendments to the Constitution of the United States from abridgment by a state.

"Thornhill *v.* State of Alabama, 310 U. S. 88, 84 L. Ed. 1093, l.c. 1098;

Douglas *v.* Jeannette, 319 U. S. 157, 87 L. Ed. 1324, l.c. 1337.

"(b) These fundamental rights of freedom of assembly and freedom of speech are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect, and even then legislative intervention can find constitutional justification only by dealing with the abuse, and the rights themselves must not be curtailed.

"Whitney *v.* California, 274 U. S. 357, 71 L. Ed. 1095, l.c. 1106;

DeJonge *v.* Oregon, 229 U. S. 353, 81 L. Ed. 278;

West Virginia State Board of Education *v.* Barnette, 319 U. S. 624, l.c. 639, 87 L. Ed. 1628, 147 A. L. R. 674, l.c. 682;

Herndon *v.* Lowry, 301 U. S. 242, 81 L. Ed. 1066;

Hague *v.* C. I. O., 307 U. S. 496, 83 L. Ed. 1423.

"VI.

"The trial court erred in sustaining respondents' motion to dismiss the petition because it did allege sufficient facts to show that Rule 23, Section 342 of the Police Manual is unconstitutional as depriving appellants without due process of law of their liberty to become members of a labor union contrary to Section 10 of Article I of the Constitution of Missouri, and to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to Section 2 of Article I of the Constitution of Missouri.

"(a) The term "liberty" as used in the above constitutional provisions has a broad meaning and em-

braces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as were.

"In re Flukes, 157 Mo. 125, l.c. 131;
Grosjean *v.* American Press Co., 80 L. Ed. 660, 665, 297 U. S. 233, 234;
Allgeyer *v.* State of Louisiana, 165 U. S. 578, 589, 41 L. Ed. 832, 835, 17 S. Ct. 427;
11 Am. Jur. 1135.

"(b) The right of employees to organize is a fundamental right of which they should not be deprived without due process of law.

"National Labor Relations Board *v.* Jones and Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615;
Amalgamated Utility Workers *v.* Consolidated Edison Co., 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561."

No separate assignment of errors is required to be filed in the Supreme Court of Missouri, but it is sufficient that the brief contain a statement of the points relied on, which shall specify the allegations of error with citation of authorities thereunder. Rule 1.08 (a)(3) of the Rules of the Supreme Court of Missouri. *Crollard* v. *Northern Life Insurance Company,* 200 S. W. (2d) 375.

Points V and VI were argued under Section V and VI of the printed argument appearing on pages 75 to 89 of the Statement. Brief and Argument of Appellants filed in the Supreme Court of Missouri.

The appeal was assigned to Division One of the Supreme Court of the State of Missouri, which handed down its opinion and judgment on July 14, 1947, reversing the judgment of the trial court, and entering its declaratory judgment in accordance with its opinion. We quote the following excerpts from pages 17 to 20 of the opinion of Division One

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of the Supreme Court of Missouri in which the federal questions raised by appellants were considered and ruled upon.

"Appellants further contend that Rule 23, Sec. 342 of the Police Manual 'is unconstitutional as denying appellants and other members of the Police Department the right of freedom of speech and freedom of assembly and petition contrary to Secs. 8 and 9 of Art. I of the Constitution of Missouri, and contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States.' It is insisted that members of the Metropolitan Police Force have a right to join a labor union and assemble and exercise their right of freedom of speech to discuss matters affecting their employment; and that these fundamental rights cannot be restricted save to prevent grave and immediate danger to interests which the state must protect. Appellants further contend that the questioned rule 'is unconstitutional as depriving appellants without due process of law of their liberty to become members of a labor union contrary to Sec. 10 of Article I of the Constitution of Missouri, and to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to Sec. 2 of Article I of the Constitution of Missouri.' It is contended that the rule deprives appellants of their natural right to liberty, the pursuit of happiness and the enjoyment of the gains of their own industry guaranteed by Sec. 2 of Article I of the Missouri Constitution. Appellants insist that the term 'liberty' as used in the above constitutional provisions has 'a broad meaning and embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as were'; and that the right of appellants, as employees, to organize and join a labor union is a fundamental right of which they may not be deprived without due process of law.

"No question arises on this record concerning the rights of private citizens to organize themselves into labor unions and exercise all of the claimed constitutional rights and privileges. The case does not involve

in any way the merits or demerits of labor unions. The question presented here arises after the appellants and those on behalf of whom the suit is brought have been sworn in as police officers of the Metropolitan Police Force of the City of St. Louis, and after they have voluntarily assumed a particular relationship to the respondents, to the City of St. Louis and to this State. As police officers, their relationship to the City and State is necessarily very different from that of private citizens.

"In the case of McAuliffe *v.* Mayor, etc., of the City of New Bedford, 155 Mass. 216, 29 N. E. 517, decided January 6, 1892, Justice Holmes in upholding a rule excluding police from political activity stated: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.'

"In the case of Fraternal Order of Police *v.* Harris, supra, 10 N. W. (2d) 310, 312, the court said: 'Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe: 'Nor can it be denied that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board.'

"In Brownell *v.* Russell, supra, 57 Atl. 103, a rule excluding members of the police force from being 'a delegate or representative to, or member of, any political or partisan convention or caucus, or take any part in any political canvass,' was upheld. The court said: 'We think the removal of the police force from the field

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of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose.'

"Even a judge of this court, when he ceases to be a private citizen and becomes a judge, must surrender his personal right to 'directly or indirectly make any contribution to or hold any office, in a political party or organization, or take part in a political campaign.' Sec. 29(f), Art. V. Const. of Mo. 1945. When a private citizen becomes a judge, he must cease to practice law and to do law business. Sec. 24, Art. V. Const. of Mo. 1945.

"Restrictions upon the political activities of civil service employees of the City of St. Louis have been upheld, although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. State ex inf. McKittrick, Atty. Gen. *v.* Kirby, 349 Mo. 988, 163 S. W. (2d) 990.

"In the recent case of United Public Workers of America *v.* Mitchel, supra, 91 L. Ed. 509, in construing and upholding the Hatch Act, 18 USCA Secs. 61 (h) and 61 (0) which declare unlawful certain specified political activities of federal employees, the United States Supreme Court pointed out that fundamental human rights were not absolutes and that that 'court must balance the extent of the guarantees of freedom against congressional enactment to protect a democratic society against the supposed evil of political partisanship by the classified employees of government.' A restriction against taking 'any active part in political management or in political campaigns' was approved.

"On the facts stated in appellants' petition, the rule complained of did not conflict with the constitutional provisions relied upon. The enforcement of the rule, as threatened, would not invade the constitutional rights of appellants, as claimed. The rule was not invalid or void as to appellants and those on behalf of whom this suit was brought. Appellants are subject to

disciplinary action thereunder. The trial court should have so declared the law and thereafter denied other relief.

"The judgment of the trial court is accordingly reversed, the rights of the parties are declared as stated, and appellants are denied other relief.

"It is so ordered."

On the same day Division One handed down its opinion the cause was transferred to the Court En Banc on the court's own motion. On November 10, 1947, the Supreme Court of Missouri, En Banc, reversed the judgment of the Circuit Court of the City of St. Louis, and entered a declaratory judgment in accordance with the opinion of Dalton, Commissioner, handed down in Division One on July 14, 1947, Leedy, Hyde, Ellison and Conkling, JJ., concurring in said opinion except as to the reasons given for holding inapplicable Section 29, Article I of the 1945 Constitution of the State of Missouri, Douglas, J., concurring in the result in a separate concurring opinion, and Clark, J., and Tipton, C. J., concurring in the result and in the separate concurring opinion of Douglas, J.

On November 24, 1947, appellants duly filed their motion for a rehearing, in which, among other things, they called the attention of the Supreme Court of Missouri to the fact that in ruling and holding that Rule 23, Section 342 of the Police Manual did not deprive appellants of the rights guaranteed to them under the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, the court had overlooked and failed to discuss certain controlling decisions of the Supreme Court of the United States referred to in said motion for rehearing. Appellants' motion for a rehearing was overruled by the Supreme Court of Missouri, En Banc, on December 8, 1947, and the opinion theretofore rendered by Division One of the Supreme Court of Missouri, and concurred in by a majority

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of the justices of the Supreme Court of Missouri, En Banc, was modified by substituting new pages 15, 16, 17 and 18 for pages 15, 16, 17, 18, 19 and 20 of the opinion handed down in Division One. This modification had reference to the grounds stated for holding inapplicable Section 29 of Article I of the Constitution of Missouri, and the decision and ruling on the points raised by appellants that Rule 23, Section 342 of the Police Manual was invalid as being repugnant to the First Amendment and to Section 1 of the Fourteenth Amendment to the Constitution of the United States were not changed in any respect.

(h)

Statement Respecting Opinions

A copy of the opinions handed down in Division One of the Supreme Court of Missouri on July 14, 1947 is attached to this jurisdictional statement as Appendix "A". A copy of the concurring opinion of Douglas, J., handed down on November 10, 1947, is attached to this jurisdictional statement as Appendix "B". A copy of new pages 15, 16, 17 and 18 which were substituted for pages 15, 16, 17, 18, 19 and 20 of the opinion handed down by Division One by the modification of said opinion made by the Supreme Court of the State of Missouri on overruling appellants' motion for rehearing is attached to this jurisdictional statement as Appendix "C".

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX "A"

COPY OF OPINIONS HANDED DOWN IN DIVISION ONE OF THE SUPREME COURT OF MISSOURI ON JULY 14, 1947

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE—APRIL SESSION, 1947

No. 39,954 •

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, *Appellants,*

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, *Respondents*

This is a class action by five patrolmen and four sergeants, members of the Metropolitan Police Force of the City of St. Louis, for and on behalf of themselves and all other patrolmen, sergeants and turnkeys of the Metropolitan Police Force of the City of St. Louis, similiarly situated, for a declaratory judgment to the effect that Rule 23, Sec. 342 of the Police Manual adopted by the Board of Police Commissioners of the City of St. Louis, prohibiting the members of the force from becoming members of a union of members, is unreasonable, arbitrary, illegal, unconstitutional and void; and that plaintiffs and others on whose behalf the suit is prosecuted are not subject to disciplinary action for violation of the rule. Plaintiffs further asked for a permanent injunction, enjoining defendants from instituting disciplinary action against plaintiffs and those on whose behalf the suit is brought and from otherwise enforcing the rule, and for other relief. Defendants filed a motion to dismiss, which motion was sustained, and judg-

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ment of dismissal was entered. Plaintiffs have appealed.

The allegations of the petition are substantially as follows:

That, on December 28, 1928, defendants, purporting to act under the authority of a statute, towit, what is now Sec. 7695 R. S. 1939, adopted a Manual of Rules and Regulations for the government and discipline of the Metropolitan Police Department of the City of St. Louis, including Rule 23, Sec. 342, as follows: "All members and employees of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employees other than" certain authorized relief, funeral and pension fund associations therein named.

That on or about October 20, 1945, certain patrolmen and others of the Force "deeming it desirable that the patrolmen, sergeants, turnkeys and civilian employees of the Metropolitan Police Department of the City of St. Louis organize for the purpose of bettering their working conditions and seeking redress of certain existing grievances in connecting with their employment, and for the purpose of improving the relations between them and the Board of Police Commissioners of said City, applied to the American Federation of State, County and Municipal Employees for a charter for a local union of said American Federation, and that said charter was thereafter duly issued constituting the charter members therein named, and their successors, Local Union No. 549 of the American Federation of State, County and Municipal Employees (hereinafter referred to as Local No. 549). * * * That 638 patrolmen, 30 sergeants, 10 turnkeys, and 145 other employees of the Metropolitan Police Department of the City of St. Louis have applied for membership in Local No. 549, and have been duly accepted and admitted as members of said Local"; and that plaintiffs are the officers of Local No. 549.

That on November 29, 1945, defendants adopted a resolution to the effect that Rule 23, Sec. 342, is valid and should be vigorously enforced; and that it be resolved as follows:

"That all members and employees * * * who are members of or who have participated in the organization of,

or who have made application to join Local No. 549 * * * be and they are hereby notified * * * that each of them is directed to file * * * a statement in writing as to whether or not he has resigned from membership in the above-mentioned union, or in case he has applied for membership, whether he has withdrawn his application for membership in said union. The said statement in writing shall be filed by him not later than midnight December 5, 1945. * * * Members who have not filed such written statements within the time above stated will be subject to disciplinary action for violation of the above-mentioned rule. * * *"

That in accordance with said resolution defendants intend to break up and destroy the aforesaid union by intimidating and coercing the members thereof to resign therefrom * * * and by threatening diciplinary action"; that plaintiffs and others have refused to resign from said local and, if Rule 23, Sec. 342 is valid, are all subject to disciplinary action for violation thereof "by reason of having become members of said local and having refused to resign as members thereof"; and that charges were preferred and heard by defendants against certain officers of Local No. 549, for violation of Rule 23, Sec. 342 and said Patrolmen were dismissed from the Police Force of the City of St. Louis on December 19, 1945.

Concerning the union, it is alleged: "That the American Federation of State, County and Municipal Employees is a labor union affiliated with the American Federation of Labor, its subordinate locals, to which it grants charters, having as members various employees, including policemen, of states, counties and municipalities in the United States * * *"; that on the 24th day of March, the governing body of the American Federation of State, County and Municipal employees adopted a motion "directing that a no strike provision be included in all charters issued to affiliated local unions of said Federation which comprised police officers, and that pursuant to said action a clause was included in the Charter issued to Local No. 549, providing that said charter was issued with the understanding of the parties that it would be revoked immediately if the members of Local No. 549 should call or participate in a

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strike or refuse to perform their duties as police officers. * * *"

That the Constitution of Local No. 549 duly adopted by a vote of its members at a meeting held on January 14, 1946, and duly approved by the Governing body of the American Federation of State, County and Municipal Employees, contains the following articles relative to the objects of said local and the methods of obtaining such objects, towit: The objects of the local union are to unite "for mutual welfare, protection of advancement * * * to advance the general social and economic welfare of employees * * * within the jurisdiction of the American Federation of State, County and Municipal Employees to work for the establishment and maintenance of fair wages, hours and working conditions for all employees of the St. Louis Police Department, including civilian employees"; and that "the methods of obtaining the objects of this Local Union shall be by petitioning the Board of Police Commissioners of the City of St. Louis, by petitioning the Legislature of the State of Missouri, and by other lawful means, provided, however, that the members of this Local Union shall never strike or threaten to strike for any reason whatsoever."

"That said Constitution of Local No. 549 contains the following Article relative to the performance by the members of Local No. 549 of their duties as members and employees of the Metropolitan Police Force of the City of St. Louis," towit, that "the oath taken by members of this Local Union in becoming members of the Metropolitan Police Force of the City of St. Louis and the duties of members of this Local Union as members or employees of said Metropolitan Police Force shall come first and be superior to any obligation to this Local Union or the American Federation of State, County and Municipal Employees, or to any other organization. All members of this Local Union are obliged at all times to perform their duties as members and employees of the Metropolitan Police Force of the City of St. Louis diligently and faithfully, without partiality or prejudice."

That said Constitution of Local No. 549, dealing with amendments, provides that no amendment shall be made

"to authorize the members of this local union to strike, or to threaten to strike and can never be amended so as to place the obligation of the members of the local union to this local union, or to the American Federation of State, County and Municipal Employees, or to any other organization before their obligation and duties as members or employees of the St. Louis Police Department. * * * This constitution and all amendments shall be subject to approval by the General Executive Board of the American Federation of State, County and Municipal Employees." Other allegations of the petition need not be set out.

Defendants' motion to dismiss plaintiffs' petition, which motion was sustained, alleged that the court had no jurisdiction over the subject matter of the action; that no actual justiciable controversy existed; that the petition did not state facts sufficient to entitle plaintiffs to the relief asked, nor to any relief; and that it had failed to state a claim upon which relief could be granted.

Appellants first contend that, on the facts stated, a proper case was made for a declaratory judgment; that a suit for a declaratory judgment is a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes, ordinances, and the orders of administrative boards and agencies; that the controversy shown, between appellants and respondents as to the validity of Rule 23, Sec. 342 of the Police Manual, is a justiciable controversy, which may be determined in a suit for a declaratory judgment; that the right to a declaratory judgment was shown independent of the right to relief by injunction; and that the trial court erred in sustaining the motion to dismiss.

Respondents contend that the petition fails to show a justiciable controversy under the Declaratory Judgment Act, Secs. 1126-1140 R. S. 1939, "because it contains no allegations which authorize the court to take jurisdiction." Respondents' theory is that the Declaratory Judgment Act is a procedural statute; that the act did not create new substantive rights; that it did "not confer jurisdiction upon courts to act in cases where they would not otherwise have jurisdiction"; that it did "not enlarge the jurisdiction of the court" nor give to appellants any new rights (Borchard

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on Declaratory Judgments (2nd Ed.) p. 233); that "the jurisdiction to hear and determine the rights and status of officers of the police force of the City of St. Louis has been lodged in an administrative board"; and that the petition "contains allegations which preclude the court from taking jurisdiction because exclusive jurisdiction is lodged in the Board of Police."

The petition alleged the existence of a particular rule adopted by the respondents; that the rule forbids members of the police force from joining a union; that the respondents consider the rule reasonable, valid and enforceable; that appellants and others, subject to the rule, have joined a union; that respondents have enforced the rule against others and have expressed their intention of enforcing the rule against appellants; that, on the facts stated, the rule is arbitrary, unreasonable, unconstitutional, and void; and that the enforcement of the rule against appellants will cause irreparable damage. Appellants ask a determination of the validity of the rule and an injunction against its enforcement. The petition clearly shows that an actual controversy exists as to the validity of the rule. It sufficiently shows a state of facts presenting issues ripe for determination. The court is presented a controversy, between parties with adverse interests, admitting of specific relief by way of a declaratory judgment, which will be conclusive in character and determinative of the issues involved. City of Joplin *v.* Jasper County, 349 Mo. 441, 161 S. W. (2d) 411, 412. "The act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances." City of Joplin *v.* Jasper County, supra, and authorities cited. The rule adopted by respondents, under the authority granted by Sec. 7995 R. S. 1939, has somewhat the force and effect of an ordinance of a municipality and, whether or not the rule is inherently invalid, or invalid in its application to appellants, may properly be determined by a declaratory judgment. Borchard, Declaratory Judgments (2nd Ed.), pp. 875, 909, and cases cited. The matter of determining the validity of the rule was not a matter within the exclusive jurisdiction of the respondents.

The trial court had the right in a proper case, independent of the Declaratory Judgment Act, to declare a rule or regulation of respondents to be void. State ex rel. Kennedy *v.* Remmers, 340 Mo. 126, 101 S. W. (2d) 70. An administrative officer or agency proceeding or threatening to proceed without jurisdiction and in excess of powers granted may be restrained. Carson *v.* Sullivan, 284 Mo. 353, 223 S. W. 571; State ex rel. Brokaw *v.* Board of Education of City of St. Louis, (Mo. App.), 171 S. W. (2d) 75, 83. The first section of the Declaratory Judgment Act, Sec. 1126 R. S. 1939, expressly provides that the courts "shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed.* * * * *The declaration may be either affirmative or negative in form and effect.* * * *" (Italics ours). In determining whether the court has jurisdiction to determine the validity of the rule under the Declaratory Judgment Act, it is immaterial whether appellants are entitled to the requested injunction or whether they are entitled to a judgment that the rule is void. Davis *v.* Cook, 55 F. Supp. 1004, 1007; Black *v.* Little, 8 F. Supp. 867, 870; Sec. 1126, supra. An action for a declaratory judgment was a proper one under the facts stated in the petition. Smith *v.* Pettis County, 345 Mo. 839, 136 S. W. (2d) 282, 285; Liberty Mutual Ins. Co. *v.* Jones, 344 Mo. 932, 130 S. W. (2d) 945. See, United Public Workers *v.* Mitchell, 67 S. Ct. 556, 91 L. Ed. 509, 518; Declaratory Judgments, Hyde, 26 W. U. L. Q. p. 468. The court should have entertained the action and determined the validity of the rule. If, as a matter of law, the rule was not unreasonable, arbitrary, unconstitutional or void, and, if under the facts stated in appellants' petition, appellants were not entitled to a declaration of invalidity or other relief, it was unnecessary to hear any evidence. The court should have declared the rights of the parties without further delay. The Court erred in sustaining the motion to dismiss and in not entering a judgment declaratory of the rights of the parties with reference to the questioned rule.

Under the facts stated in the petition, is Rule 23, Sec. 342, supra, wholly unreasonable? The Board of Police Commis-

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sioners of the City of St. Louis is an administrative agency created by statute and endowed with the power to appoint, discipline and control the members of the Metropolitan Police Force. Section 7689 et seq., R. S. 1939; State ex rel. Kennedy *v.* Remmers, supra (101 S. W. (2d) 70, 72). Statutory provision has been made concerning the selection of the members of the police force, their rank, number, qualification, promotion, pay, duties, hours of employment, discipline and removal. Sec. 7691-7696 R. S. 1939. By Sec. 7711 R. S. 1939, it is expressly provided that the members of the police force shall be officers of the city and also officers of the State of Missouri. The board is expressly authorized "to make all such rules and regulations, not inconsistent with this article, or other laws of the state, as they made judge necessary, for the appointment, employment, uniforming, discipline, trial and government of the police, * * * All lawful rules and regulations of the board shall be obeyed by the police force on pain of dismissal or such lighter punishment, either by suspension, fine, reduction or forfeiture of pay, or otherwise as the boards may adjudge." Sec. 7695 R. S. 1939. Appellants alleged that the board, purporting to act under the authority of Sec. 7695, supra, adopted the rule, the validity of which is here called into question.

Appellants contend that the rule is unreasonable (on its fact) "as barring membership in all unions irrespective of whether they are or are not inimical to the discipline and efficiency of the police department"; and that "the rule can only be sustained if membership in *any* union can, as a matter of law, be said to be detrimental to the proper functioning and efficiency of the police department." We are concerned only with the reasonableness of the rule as applied to appellants. Turner *v.* Kansas City, 354 Mo. 857, 191 S. W. (2d) 612, 617.

In view of the broad authority granted respondents by statute, supra, and the admitted adoption of the rule pursuant thereto, the rule must be regarded as prima facie reasonable. State ex rel. Kennedy *v.* Remmers, supra (101 S. W. (2d) 70, 73); State ex rel. O'Bannon *v.* Cole, 220 Mo. 697, 707, 119 S. W. 424 (school regulation); State ex rel. Horton *v.* Clark (Mo. Sup.), 9 S. W. (2d) 635 (health regu-

lation); 43 C. J. 311, Sec. 323. The burden rested upon appellants to plead facts to show the invalidity of the rule. City of St. Louis *v.* United Rys. of St. Louis, 236 Mo. 387, 455, 174 S. W. 78, 94. Only in a clear case will the courts interfere on the ground of unreasonableness. Wagner *v.* City of St. Louis, 284 Mo. 410, 417, 224 S. W. 413, 415; Ex parte Lockhart, 350 Mo. 1220, 171 S. W. (2d) 660, 664. While a court can declare a rule of an administrative agency unreasonable upon its face by a mere inspection of the rule, if the rule upon its face chances to be one of that character, yet courts act cautiously in such matters and, in view of the broad authority and discretion granted to the board under the terms of Sec. 7695, supra, and the common knowledge and general understanding as to the meaning of the term "union," as used in the rule, we think the board was in a far better position to determine the necessity, desirability and reasonableness of the rule than the court, unless the facts bearing upon the reasonableness of the rule should in some manner be presented to the court. See, City of St. Louis *v.* St. Louis Theatre Co., 202 Mo. 690, 699, 100 S. W. 627 (concerning ordinances); Stegmann *v.* Weeks, 279 Mo. 140, 214 S. W. 137, 138; Deskins *v.* Gose, 85 Mo. 485, 487 (rules for governing of school children). Accordingly, we decline to hold that the rule is unreasonable on its face.

Was the rule unreasonable as applied to appellants? This question requires a careful review of all of the facts stated in the petition, as hereinbefore set forth, as well as a review of the provisions of the several statutes referred to. It will be unnecessary to restate these facts, or to quote the several statutes, but they must be kept in mind.

Appellants concede that the evidence, if heard, would have been in line with the allegations in the petition concerning Local No. 549. Appellants contend that the rule is unreasonable "as applied to the factual situation disclosed by the petition; that it bears no reasonable relation to any of the subjects concerning which the Board of Police Commissioners has authority to adopt rules and regulations; and that it is in excess of the power conferred upon such board." Appellants insist that, in view of the particular kind of a union, which the allegations in the petition show Local No. 549 to be, membership in Local No. 549

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could not possibly have any deleterious effect upon the proper functioning and discipline of the police department; that the absolute prohibition and the penalty provided by the rule have no reasonable relationship to the discipline and government of the police (Sec. 7695, supra); and that the rule, as applied to appellants under the facts alleged, is unreasonable, arbitrary and capricious.

Appellants point out and particularly emphasize that the members of this local union cannot strike or threaten to strike; that the oath taken as members of the police force shall come first and be superior to any obligation to the union; and that the members are required to perform their duties as members of the police force diligently and faithfully, and without partiality or prejudice. Respondents, in reply, urge that it is a matter of common knowledge that labor unions, not only exercise the right to strike and threaten to strike, but have and exercise other rights, such as the right to bargain collectively, to enter into closed shop agreements and to picket, matters not denied to appellants by the charter of Local No. 545. Appellants reply that these matters are mere "red herrings" drawn into the case to becloud the simple issue whether or not a rule, which prohibits members of the police from joining a labor union, such as Local No. 549 is alleged to be, and which authorizes the dismissal of a policeman merely because of his membership in such a union, is a reasonable rule and within the authority of respondents.

Appellants concede that "the right to bargain collectively, as the term is ordinarily understood, does not exist in the case of public employees on account of the legal restrictions upon the authority of the administrative officers"; and that "public employees belonging to a union * * * do not have the right to bargain collectively with their employer, whether it be in the City, County or State, as do members of unions who are employed in private industry."

Appellants further concede that "governmental employees should not be permitted to contract for the closed shop"; and that "obviously opportunity for government employment should be extended to all citizens irrespective of whether they are or are not members of a union." With reference to the right of members of Local No. 549 to picket

the Board of Police Commissioners, appellants say that "such picketing would, no doubt, constitute conduct unbecoming an officer and would be ground for discipline."

Appellants urge that, without collective bargaining in its technical sense, "the union can, by publicity, direct public attention to conditions that need correcting"; that it can "seek legislative action"; that "it can represent individuals in administrative procedure, and prevent discriminatory and arbitrary practices"; and that "the presentation of grievances to the Board of Police Commissioners is an orderly, dignified and respectful manner," and the "presentation of grievances to the legislature, whether they be for the correction of salary rates or working conditions," cannot be injurious to the good order and discipline of the Police Department or detrimental to its "efficiency and smooth functioning."

Appellants' position further is that "the petition clearly shows that the only purpose of this union is to unite the employees of the Police Department for mutual welfare, protection and advancement, to advance their general social and economic welfare and to work for the establishment and maintenance of fair wages, hours and working conditions"; and that "any sources of friction and dissatisfaction among the members of the force" can be eliminated so as to "improve the morale and efficiency of the department as a whole." Appellants finally say, "this court cannot say on the face of the petition, without any evidence, that any harmful results would ensue from membership in this union."

Appellants concede that in determining the issue of reasonableness of the rule in question, we are not limited alone to the detailed facts alleged in the petition, but may take judicial notice of material facts of common knowledge. 37 Am. Jur., Municipal Corporations, Sec. 173, p. 803. We may further consider the purpose and effect on the questioned rule.

The petition alleged the purpose for which the union was formed, the objects of its existence, as shown by its charter, and the methods by which it expects to obtain its objects. In accordance with these allegations, the court, of course, knows what a labor union is, the type of organization, the

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ordinary purposes for which it exists and how it ordinarily functions and operates. It is further a matter of common knowledge that some of the most common methods used by labor unions to accomplish their purposes are strikes, threats to strike, collective bargaining agreements, closed shop agreements, picketing, etc. It is clear that all of the rights and powers ordinarily inherit in a labor union would exist actually or potentially, in Local No. 549, regardless of the form of its charter and the present admissions of appellants. We may not assume that these available powers would not be exercised. Only the first two methods are excluded by the charter of Local No. 549, although appellants admit that the exercise of these other rights, guaranteed to labor unions in private industry by many decisions, have little or no place whatsoever when applied to the particular public employment in which appellants are engaged.

It appears from the petition that Local No. 549 received its charter and authority to function as a labor union from the American Federation of State, County and Municipal Employees; that said organization is a labor union affiliated with the American Federation of Labor; and that such outside organizations control the policy of Local No. 549, since its constitution and all amendments are subject to the approval of the governing body, or General Executive Board of the American Federation of State, County and Municipal Employees. The petition, therefore, shows upon its face that the appellants and the others on behalf of whom the suit is brought have sought assistance from outside their own membership; that they have applied to and received a charter from an outside organization; and that such other outside organization is further affiliated with a nation-wide labor organization. That such outside organization will control and direct the policy of Local No. 549 must be conceded. The court will further take judicial notice of the cooperation between labor unions, of the fact that members of one union ordinarily refuse to cross the picket line of another union and of the control ordinarily exercised by national labor organizations over the local organizations.

Members of the police department are sworn officers of the law, whose duty it is to enforce the law equally and without fear or favor. The legislature recognized the necessity for order, discipline and authority in the police force. It provided for a semi-military organization, with officers and men of different rank, and granted express authority to the Board to make rules and regulations for the *discipline* and *government* of the police. We think the rule in question bears a direct relationship to both the discipline and the government of the police force. See, Brownell *v.* Russell, 76 Vt. 326, 57 Atl. 103, 104, (removal of police from active politics).

"A police force is peculiar, sui generis, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force organized under the laws of the United States and equally as important as to the functions it is required to perform. * * * It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of the controlling head just as much as the common soldier must surrender his own opinion and power of action to that of his commanding officer. And there is the same necessity of discipline, of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective and without the supervision or regulation of any other department of state, and, particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly to regulate its dicipline." O'Regan *v.* City of Chicago (Chicago Legal News, Vol. 37, p. 150); Coane *v.* Geary, 298 Ill. App. 199, 18 N. E. (2d) 719, 722; Fraternal Order of Police *v.* Harris, 306 Mich. 68, 10 N. W. (2d) 310, 311.

The right of municipal governments to restrict or prohibit affiliation of groups of their employees with labor unions or employees organizations has been sustained in a number of decisions involving policemen, firemen and school teachers. See, Labor Unions and Municipal Employ-

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ees Law by Charles S. Rhyne, p. 26; Fraternal Order of Police *v.* Harris, supra; Carter *v.* Thompson, 164 Va. 312, 180 S. E. 410; City of Jackson *v.* McLeod, (Miss.), 24 So. (2d) 319; San Antonio Fire Fighters Local Union No. 84 *v.* Bell (Court of Civil Appeals, Texas), 223 S. W. 506; McNatt *v.* Lawther, (Court of Civil Appeals, Texas), 223 S. W. 503; Hutchinson *v.* Magee, 278 Pa. 119, 122 Atl. 234. Appellants contend that the cases cited in support of the above statement, and here relied upon by respondents, "are distinguishable when carefully analyzed." It is true that no case presents the same factual situation, nor the same issues of law that are presented here, but the reasoning and arguments contained in the several cases fully support respondents' position in this case.

In Carter *v.* Thompson, supra, 180 S. E. 410, 412, the court said: "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

In the case of Hutchinson *v.* Magee, supra, 122 Atl. 234, the court said: "It is generally conceded that association with an organization which, on any occasion or for any purpose, attempts to control the relations of members of either the police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare."

In the City of Jackson *v.* McLeod, supra, 24 So. (2d) 319, 321, the court said: "It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are liable to arise, which in turn may

lead to disorders. * * * The police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, as far as their activities as policemen are concerned."

While it is true that the charter of Local No. 549 purports to provide that the obligation of members of the police force shall be superior to any obligation to the union, yet so long as human nature is what it is, a man cannot serve two masters. We think it is clear that membership in Local No. 549 might reasonably cause friction and dissension within the force and create prejudice and favoritism in the enforcement of the laws. We hold that the questioned rule was within the powers granted to the respondents by statute; that it bears a reasonable relation to the subject of discipline and government of the police on which respondents may adopt rules and regulations; and that, unless excluded by some applicable provision of the Federal or State Constitutions, the rule is not unreasonable, invalid or unenforceable against appellants and those on behalf of whom the suit is brought.

Section 29, Art. I of the Constitution of Missouri, 1945, provides "that employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Appellants contend that the provision is applicable to appellants as employees of the City of St. Louis and of the State of Missouri: that the debates in the constitutional convention and the votes on proposed amendments prior to the adoption of the provision show that the provision was intended to be applicable to state and municipal employees; and that the word "employees," as used in Sec. 29, Art. I, is broad enough to include appellants. It is admitted that "appellants and the other members of the police force on whose behalf this suit was brought are officers of the city and state." Sec. 7711, supra; American Fire Alarm Co. *v.* Board of Police Commissioners of Kansas City, 285 Mo. 581, 590, 227 S. W. 114; State ex rel. Crow *v.* City of St. Louis, 174 Mo. 125, 131, 73 S. W. 623. Appellants, however, contended they are also "employees," within the meaning of the constitutional provision, and have the right to organize by joining a union such as Local No. 549 is alleged to be. There is no contention that respond-

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ents' civilian employees have any right to organize independent of the other members of the police force. Appellants concede, as stated, that "the right to bargain collectively, as the term is ordinarily understood, does not exist in the case of public employees"; and that "public employees belonging to a union * * * do not have the right to bargain collectively with their employer, whether it be the City, County or State." In other words, they admit that part of the provision does not apply, but insist that the remainder of the provision is applicable.

It is a rule of statutory construction that unless an act specifically mentions the state, its political subdivisions and its agencies, or by necessary implication shows an intention to apply to them, such act should not be construed so as to include them. City of Clinton ex rel. Thornton *v.* Henry County, 115 Mo. 557, 566, 22 S. W. 494; 25 R. C. L. p. 784, Sec. 32. The general rules for construction of statutes also apply to the construction of constitutional provisions. State ex rel. Buchanan County *v.* Imel, 242 Mo. 293, 301, 146 S. W. 783; State ex rel. City of Carthage v. Hackman, 287 Mo. 184, 229 S. W. 1078, 1080(3). In this case the constitutional provision is not expressly made applicable to the state or its agencies. It is for the court to determine whether the provision was intended to apply to the respondents. While the debates in the constitutional convention and the votes taken on proposed amendments, including the vote against an amendment that the right of collective bargaining should not apply to the state or any subdivision or municipality thereof, might in some cases be of aid in determining the intention of the framers of the Constitution, yet it is clear that neither the debates, nor the votes taken on proposed amendments, deal directly with the question here presented. The right of police officers of a city and of the state to organize by joining a union, such as Local No. 549 is alleged to be, was not discussed nor voted upon. The rule stated and applied in Ex parte Oppenstein, 289 Mo. 421, 233 S. W. 440, 444, cannot apply.

Mr. Ruben Wood, who offered the constitutional provision as adopted, conceded that the rights protected by the proposed constitutional provision would at all times be subject to the police powers of the state, that is, subject

to the inherent power of the state to protect the health, safety and general welfare of its people; and that labor already had the right to organize and bargain collectively independent of the adoption of the provision. The debates show that the amendment defeated was particularly directed to relieving the state or any subdivision or municipality thereof from any duty to bargain collectively with a labor union. In view of the well recognized rule for construction of constitutional provisions, the proposed amendment was unnecessary. As stated, appellants do not claim the right to bargain collectively, as that term is ordinarily understood. Mr. Wood did state that the provision, which was adopted, would deprive a city or the state of the power to tell any citizen of the state or any employee in the state that "you cannot belong to a labor union." Transcript of Debates, 1943-1944, Constitutional Convention, pp. 1932-1971. Such a statement is of limited value in construing a constitutional provision. State ex rel. Heimberger *v.* Board of Curators of University of Missouri, 268 Mo. 598, 616, 188 S. W. 128. Of more importance is how the provision was understood by the people adopting it. 11 Am. Jur., Constitutional Law, Sec. 84, p. 707. The recognized rule of construction should be applied.

Section 29, Art. I, supra, does not expressly apply to the state, to the City of St. Louis, or to respondents. While the language of the provision is broad enough to include the state and its agencies, general language is not sufficient in a case of this kind to show an intention to make the provision applicable to the state and its agencies, and this is particularly true where application of the provision to the state might tend to weaken sovereign rights, or injuriously affect the capacity of the state and its agencies to perform essential functions of government. In view of respondents' duties to preserve the public peace, prevent crime, protect the rights of persons and property, preserve order and establish, maintain and discipline a police force, as provided by Art. 26, Chap. 38 R. S. 1939, we think there could have been no intention, actual or by necessary implication, that the provision in question should apply to the state or to the respondents under the facts stated in the petition. City of Clinton ex rel. Thorn-

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ton *v.* Henry County, supra; Nutter *v.* City of Santa Monica, (Cal.), 168 Pac. (2d) 741, 746; Miami Water Works Local No. 654 *v.* City of Miami, (Fla.), 26 So. 194, 197; Petrucci *v.* Hogan, 27 NYS (2d) 718, 724; Balthasar *v.* Pac. Elec. Co., 187 Cal. 302, 202 Pac. 37, 19 A. L. R. 452; United States of America *v.* United Mine Workers, 91 L. Ed. 595, 605; 59 C. J. 1103, Sec. 653; 49 Am. Jr., States, Territories and Dependencies, Secs. 14 and 15, p. 235 and 236. We hold that Sec. 29, Art. I, does not apply to respondents and the questioned rule is not governed thereby.

Appellants further contend that Rule 23, Sec. 342 of the Police Manual "is unconstitutional as denying appellants and other members of the Police Department the right of freedom of speech and freedom of assembly and petition contrary to Secs. 8 and 9 of Art. I of the Constitution of Missouri, and contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States." It is insisted that members of the Metropolitan Police Force have a right to join a labor union and assemble and exercise their right of freedom of speech to discuss matters affecting their employment; and that these fundamental rights cannot be restricted save to prevent grave and immediate danger to interests which the state must protect. Appellants further contend that the questioned rule "is unconstitutional as depriving appellants without due process of law of their liberty to become members of a labor union contrary to Sec. 10 of Article I of the Constitution of Missouri, and to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to Sec. 2 of Article I of the Constitution of Missouri." It is contended that the rule deprives appellants of their natural right to liberty, the pursuit of happiness and the enjoyment of the gains of their own industry guaranteed by Sec. 2 of Article I of the Missouri Constitution. Appellants insist that the term "liberty" as used in the above constitutional provisions has "a broad meaning and embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as were"; and that the right of appellants, as employees, to organize and join a labor

union is a fundamental right of which they may not be deprived without due process of law.

No question arises on this record concerning the rights of private citizens to organize themselves into labor unions and exercise all of the claimed constitutional rights and privileges. The case does not involve in any way the merits or demerits of labor unions. The question presented here arises after the appellants and those on behalf of whom the suit is brought have been sworn in as police officers of the Metropolitan Police Force of the City of St. Louis, and after they have voluntarily assumed a particular relationship to the respondents, to the City of St. Louis and to this State. As police officers, their relationship to the City and State is necessarily very different from that of private citizens.

In the case of McAuliffe *v.* Mayor, etc., of the City of New Bedford, 155 Mass. 216, 29 N. E. 517, decided January 6, 1892, Justice Holmes in upholding a rule excluding police from political activity stated: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control."

In the case of Fraternal Order of Police *v.* Harris, supra, 10 N. W. (2d) 310, 312, the court said: "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe: 'Nor can it be denied that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board.' "

In Brownell *v.* Russell, supra, 57 Atl. 103, a rule excluding members of the police force from being "a delegate or representative to, or member of, any political or partisan con-

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vention or caucus, or take any part in any political canvas," was upheld. The court said: "We think the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose."

Even a judge of this court, when he ceases to be a private citizen and becomes a judge, must surrender his personal right to "directly or indirectly make any contribution to or hold any office, in a political party or organization, or take part in a political campaign." Sec 29(f), Art. V. Const. of Mo. 1945. When a private citizen becomes a judge, he must cease to practice law and to do law business. Sec. 24, Art. V. Const. of Mo. 1945.

Restrictions upon the political activities of civil service employees of the City of St. Louis have been upheld, although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. State ex inf. McKittrick, Atty. Gen. *v.* Kirby, 349 Mo. 988, 163 S. W. (2d) 990.

In the recent case of United Public Workers of America *v.* Mitchel, supra, 91 L. Ed. 509, in construing and upholding the Hatch Act, 18 USCA Secs. 61 (h) and 61(o) which declare unlawful certain specified political activities of federal employees, the United States Supreme Court pointed out that fundamental human rights were not absolutes and that that "court must balance the extent of the guarantees of freedom against congressional enactment to protect a democratic society against the supposed evil of political partisanship by the classified employees of government." A restriction against taking "any active part in political management or in political campaigns" was approved.

On the facts stated in appellants' petition, the rule complained of did not conflict with the constitutional provisions relied upon. The enforcement of the rule, as threatened, would not invade the constitutional rights of appellants, as claimed. The rule was not invalid or void as to appellants and those on behalf of whom this suit was brought. Appellants are subject to disciplinary action thereunder. The

trial court should have so declared the law and thereafter denied other relief.

The judgment of the trial court is accordingly reversed, the rights of the parties are declared as stated, and appellants are denied other relief.

It is so ordered.

S. P. DALTON,
Commissioner.

BRADLEY, *C., concurs.*
VAN OSDEL, *C., concurs.*

Per CURIAM:

The foregoing opinion by Dalton, C., is adopted as the opinion of the Court.

Hyde, J. and Conkling, J. concur.
Clark, J. concurs in result.
Douglas, P. J. concurs in result in separate opinion.
Transferred to Banc on the Court's own motion.

SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, APRIL SESSION, 1947

No. 39954 •

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOPP, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, *Appellants,*

v.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, *Respondents*

Concurring Opinion

I concur in the result reached in the principal opinion. I think it is clear from the proceedings of the Constitutional Convention that Section 29 of Article I was intended to

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apply to public employees, subject to the general police power of the State. Under the general police power, the Board of Police Commissioners are empowered in their discretion to forbid members of the police department to join a union.

However, I gravely doubt that Rule 23, Section 342 could be upheld in its entirety. It seems to be so broad as to place unreasonable restrictions on the rights of members of the police department as citizens to meet and to join organizations the purposes of which would not be inconsistent with proper police discipline.

JAMES M. DOUGLAS,
Presiding Judge.

APPENDIX "B"

Copy of concurring opinion of Douglas, J., handed down on November 10, 1947.

IN THE SUPREME COURT OF MISSOURI, EN BANC, SEPTEMBER SESSION, 1947

No. 39954 •

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, *Appellants*,

v.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, *Respondents*

Concurring Opinion

I concur in the result reached in the principal opinion. In City of Springfield *v.* Clouse this court held that Section 29, Article I of the Constitution of 1945 does not apply to

public employees, not because of a doctrine of statutory construction as held in the principal opinion, which doctrine in my view cannot be employed to nullify a provision of a bill of rights, but because the very purpose of Section 29, Article I makes it legally impossible of application to public employees.

The principal opinion in this case deals with Rule 23, Section 342 only on the issues involved in this case. Under the general police powers of the state, the Board of Police Commissioners are empowered in their discretion to forbid members of the police department to join a union.

However, I gravely doubt that Rule 23, Section 342 could be upheld in its entirety. It seems to be so broad as to place unreasonable restrictions on the rights of members of the police department as citizens to meet and to join organizations, the purpose of which would not be inconsistent with proper police discipline or inimical to public welfare.

JAMES M. DOUGLAS,
Judge.

APPENDIX "C"

Copy of new pages 15, 16, 17 and 18 substituted for pages 15, 16, 17, 18, 19 and 20 of Opinion of Dalton, Commissioner, handed down in Division One on July 14, 1947.

Section 29, Art. I of the Constitution of Missouri, 1945, provides "that employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Appellants contend that the provision is applicable to appellants as employees of the City of St. Louis and of the State of Missouri; that the debates in the constitutional convention and the votes on proposed amendments prior to the adoption of the provision show that the provision was intended to be applicable to state and municipal employees; and that the word "employees," as used in Sec. 29, Art. I, is broad enough to include appellants. It is admitted that "appellants and the other members of the police force on whose behalf this suit was brought are

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officers of the city and state." Sec. 7711, supra; American Fire Alarm Co. *v.* Board of Police Commissioners of Kansas City, 285 Mo. 581, 590, 227 S. W. 114; State ex rel. Crow *v.* City of St. Louis, 174 Mo. 125, 131, 73 S. W. 623. Appellants, however, contended they are also "employees," within the meaning of the constitutional provision, and have the right to organize by joining a union such as Local No. 549 is alleged to be. There is no contention that respondents' civilian employees have any right to organize independent of the other members of the police force. Appellants concede, as stated, that "the right to bargain collectively, as the term is ordinarily understood, does not exist in the case of public employees"; and that "public employees belonging to a union • • • do not have the right to bargain collectively with their employer, whether it be the City, County or State." In other words, they admit that part of the provision does not apply, but insist that the remainder of the provision is applicable. These contentions are ruled against appellants on the grounds stated in City of Springfield *v.* Clouse, No. 40127, decided concurrently herewith.

Appellants further contend that Rule 23, Sec. 342 of the Police Manual "is unconstitutional as denying appellants and other members of the Police Department the right of freedom of speech and freedom of assembly and petition contrary to Secs. 8 and 9 of Art. I of the Constitution of Missouri, and contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States." It is insisted that members of the Metropolitan Police Force have a right to join a labor union and assemble and exercise their right of freedom of speech to discuss matters affecting their employment; and that these fundamental rights cannot be restricted save to prevent grave and immediate danger to interests which the state must protect. Appellants further contend that the questioned rule "is unconstitutional as depriving appellants without due process of law of their liberty to become members of a labor union contrary to Sec. 10 of Article I of the Constitution of Missouri, and to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to Sec. 2 of Article I of the Constitution of Mis-

souri." It is contended that the rule deprives appellants of their natural right to liberty, the pursuit of happiness and the enjoyment of the gains of their own industry guaranteed by Sec. 2 of Article I of the Missouri Constitution. Appellants insist that the term "liberty" as used in the above constitutional provisions has "a broad meaning and embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as were"; and that the right of appellants, as employees, to organize and join a labor union is a fundamental right of which they may not be deprived without due process of law.

No question arises on this record concerning the rights of private citizens to organize themselves into labor unions and exercise all of the claimed constitutional rights and privileges. The case does not involve in any way the merits or demerits of labor unions. The question presented here arises after the appellants and those on behalf of whom the suit is brought have been sworn in as police officers of the Metropolitan Police Force of the City of St. Louis, and after they have voluntarily assumed a particular relationship to the respondents, to the City of St. Louis and to this State. As police officers, their relationship to the City and State is necessarily very different from that of private citizens.

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In the case of Fraternal Order of Police *v.* Harris, supra, 10 N. W. (2d) 310, 312, the court said: "Those who serve the public, either as the makers of the law, the interpreters

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of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe: 'Nor can it be denied that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board.' "

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Even a judge of this court, when he ceases to be a private citizen and becomes a judge, must surrender his personal right to "directly or indirectly make any contribution to or hold any office, in a political party or organization, or take part in a political campaign." Sec. 29(f), Art. V, Const. of Mo. 1945. When a private citizen becomes a judge, he must cease to practice law and to do law business. Sec. 24, Art. V, Const. of Mo. 1945.

Restrictions upon the political activities of civil service employees of the City of St. Louis have been upheld, although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. State ex inf. McKittrick, Atty. Gen. *v.* Kirby, 349 Mo. 988, 163 S. W. (2d) 990.

In the recent case of United Public Workers of America *v.* Mitchel, supra, 91 L. Ed. 509, in construing and upholding the Hatch Act, 18 U. S. C. A. Secs. 61(h) and 61(o) which declare unlawful certain specified political activities of federal employees, the United States Supreme Court pointed out that fundamental human rights were not absolutes and that that "court must balance the extent of the guarantees of freedom against congressional enactment to protect a democratic society against the supposed evil of political partisanship by the classified employees of government." A re-

striction against taking "any active part in political management or in political campaigns" was approved.

On the facts stated in appellants' petition, the rule complained of did not conflict with the constitutional provisions relied upon. The enforcement of the rule, as threatened, would not invade the constitutional rights of appellants, as claimed. The rule was not invalid or void as to appellants and those on behalf of whom this suit was brought. Appellants are subject to disciplinary action thereunder. The trial court should have so declared the law and thereafter denied other relief.

The judgment of the trial court is accordingly reversed, the rights of the parties are declared as stated, and appellants are denied other relief.

It is so ordered.

S. P. Dalton,
Commissioner.

Leedy, Hyde, Ellison and Conklin, J. J., concur.

Douglas, J., concurs in result in separate concurring opinion.

Clark, J., and Tipton, C. J., concur in results and in separate concurring opinion of Douglas, J.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, Appellees.

No. 630

Appeal from the Supreme Court of the State of Missouri.

APPELLANTS' BRIEF IN OPPOSITION TO DISMISSAL OF APPEAL.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, Appellees.

No. .....

Appeal from the Supreme Court of the State of Missouri.

APPELLANTS' BRIEF IN OPPOSITION TO DISMISSAL OF APPEAL.

OPINIONS BELOW.

The opinions of the Supreme Court of the State of Missouri in this cause are reported in 206 S. W. (2d) 547.

ARGUMENT.

Since appellees in their statement of suggestions making against the jurisdiction of this court are in effect asking for a dismissal of the appeal heretofore allowed herein, appellants are filing this brief in opposition to such dismissal. Inasmuch as in our statement as to the jurisdiction of this court, particularly sections (e) and (f) thereof, we have fully stated why we believe this court has jurisdiction, we shall not repeat the arguments there set forth, but shall endeavor to confine ourselves to replying to the contentions of appellees in their statement.

(a)

Rule 23, Section 342 of the Police Manual, Is a "Statute of a State" Within the Meaning of Sec. 237 (a) of the Judicial Code.

Appellees in their statement contend that since Rule 23, Section 342 of the Police Manual, prohibiting members of the Metropolitan Police Force from belonging to a union, applies only to members of the force, and is not of general application, it is not a "statute of a state" within the meaning of Sec. 237 (a) of the Judicial Code. However, we find nothing in the decisions of this court which would thus restrict its jurisdiction. One of the leading cases defining the term "statute of a state" is John P. King Mfg. Company v. City Council of Augusta, 277 U. S. 100, 72 L. Ed. 801, 48 S. Ct. 197, where this court said:

> "Any enactment from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court."

Appellees admit that municipal ordinances have been considered "statutes of a state" by this court, since they

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are enacted by the municipal legislative bodies under authority of power delegated to them by state legislatures. A rule adopted by the Board of Police Commissioners of the City of St. Louis under authority delegated to it by Sec. 7695, R. S. Mo. 1939, was likened to an ordinance of a municipality by the Supreme Court of Missouri in the case of State ex rel. Kennedy v. Remmers, 340 Mo. 126, 101 S. W. (2d) 70, 72. Consequently, a decision of the Supreme Court of Missouri sustaining the validity of such a rule should be reviewable by this court as in the case of an ordinance of a municipality.

The challenged rule was adopted under authority of the State of Missouri, and has the force of law just as if a statute to the same effect had been adopted by the legislature of Missouri, for the rule must "be obeyed by the police force on pain of dismissal or such lighter punishment * * * as the board may adjudge." Sec. 7695, R. S. Mo. 1939. If a statute had been adopted by the Missouri legislature embodying the substance of the rule, certainly this court would have jurisdiction to review a decision of the Supreme Court of Missouri upholding it, and we are unable to perceive how the fact that the rule was adopted by appellees' predecessors in office, pursuant to authority delegated to them by the legislature, can deprive this court of such jurisdiction.

If, however, this court feels that an appeal does not lie in this case, we respectfully pray that the papers on which the appeal was allowed be regarded and acted on as a petition for certiorari, and that certiorari be granted. Sec. 237 (c) of the Judicial Code, as amended. 28 U. S. C. A. 344 (c). C. J. Hendry Co. v. Sematovich, 316 U. S. 643, 86 L. Ed. 1728, 62 S. Ct. 1031.

(b)

The Appeal Does Involve a Substantial Federal Question as to the Validity of Rule 23, Section 342 of the Police Manual.

Appellees contend that since a number of state courts have upheld rules similar to Rule 23, Section 342 of the Police Manual, and the decision of the Supreme Court of Missouri was unanimous in sustaining the rule, this appeal does not raise any substantial federal question. Appellees also cite decisions of this court in which restrictions on the right of civil service employees engaging in political activities have been sustained. The question as to whether a state or a municipality may prohibit its officers or employees from belonging to a labor union without violating their rights under the Constitution of the United States, however, has never been decided by the Supreme Court of the United States, and we respectfully submit that it should be in view of the numerous cases arising and which are likely to arise in which the right to join unions is or will be asserted by such officers or employees under their rights of freedom of speech, assembly and petition guaranteed to all persons by the First and Fourteenth Amendments to the Constitution of the United States. After all, the final determination of the rights of such state and municipal employees under the federal constitution is a matter for this court, and the sooner this court authoritatively determines the same, the better for all persons concerned.

The Missouri Supreme Court, en Banc, in the case of City of Springfield v. Clouse, 206 S. W. (2d) 539, decided concurrently with the case at bar, while holding that public officers and employees do not have the right of collective bargaining with their employers, nevertheless does recognize that public officers and employees generally do have

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the same rights as other citizens to organize and bring their problems to the attention of public officers and legislative bodies. We quote from the decision of the court (l. c. 542):

> "This ruling does not mean, as defendants' counsel seem to fear, that public employees have no right to organize. All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article 1 of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article 1, 1945 Constitution, was adopted. See Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 237 Wis. 164, 295 N. W. 791, affirmed 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 60 S. Ct. 561, 84 L. Ed. 738. Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions. Our General Assembly has even provided by statute for an organization of all trial and appellate judges of this state to consider and discuss the work of the courts and make recommendations for legislation. See Judicial Conference Act of 1943, Laws 1943,

p. 514, Mo. R. S. A. 2039.1-2039-8. Organizations of other state, county and municipal officers are well known and have long been recognized as serving a useful purpose. Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. ...; Oklahoma v. United States Civil Service Commission, 330 U. S. 127, 67 S. Ct. 544, 91 L. Ed. ...; King v. Priest, Mo. Sup., 206 S. W. 2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization.

"Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them."

The Missouri Supreme Court, however, in the case at bar, has denied appellants the right to organize, which it says is the right of public officers and employees generally, on the grounds that such denial in the case of policemen is necessary for the public welfare. We have referred in section (f) of our statement as to the jurisdiction of this court to the decisions of this court which hold that **the rights of freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. The opinion of the Missouri Supreme Court in the case at bar fails to point out what grave and immediate danger to interests which the state may lawfully**

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protect arises from membership of appellants in a union such as the one involved in this case. The record discloses that Local No. 549 does not have the right to strike, and Article III of its Constitution, which can never be amended, provides that the duties of members of the union as members of the Police Force shall come first and be superior to any obligation to the local, the American Federation of State, County or Municipal Employees or to any other organization, and that all members are obliged at all times to perform their duties as members of the police force diligently and faithfully and without partiality or prejudice. It is apparent, therefore, that this union does not possess the characteristics of an ordinary labor union, but is actually no more than an organization of members of the police force brought into existence so that its members might exercise their rights guaranteed to them by both state and federal constitutions "to peaceably assemble * * * to speak freely and to present their views and desires to any public officer or legislative body" which might have the power to remedy such grievances they might have or believe they have. As the Missouri Supreme Court said in the City of Springfield case, supra, this right of citizens to organize "should be safeguarded and encouraged as a means for citizens to discuss their problems together and to present them to the attention of public officers and legislative bodies." This is the only right which appellants in this case are claiming. Some kind of organization is necessary effectively to accomplish this purpose. No reason has been shown why such purpose could not be properly accomplished through the union which appellants have organized.

As we have stated, this court has never passed on the constitutional questions involved in this case. Appellees contend that the cases of United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 509, 67 S. Ct. 556; Ex Parte

Curtis, 106 U. S. 371, 27 L. Ed. 232, 1 S. Ct. 381, and United States v. Wurzbach, 280 U. S. 396, 74 L. Ed. 508, 50 S. Ct. 167, in which this court has upheld restrictions on political activities of federal officers and employees, are authority for lack of jurisdiction of this appeal. We submit, however, that these cases do not decide the questions involved in the case at bar so that this court should decline to take jurisdiction for lack of a substantial federal question.

Appellants have cited a number of cases in which various appellate courts have upheld restrictions on the right of police, firemen and other public employees to become members of labor unions. Many of these cases, however, do not consider or pass on the constitutional questions raised by appellants in this case. Thus, in Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N. W. (2d) 310, no federal questions were raised so far as appears from the opinion of the court. This was sufficient reason for this court to deny certiorari. 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781. Furthermore, the resolution of the Board of Police Commissioners complained of in the Michigan case did not prohibit patrolmen from joining the plaintiff organization, but only prohibited the taking in of associate members who were not police, but members of the general public, and required that membership in the union be limited to members of the police department below the rank of sergeant.

Likewise in City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319, certiorari denied 322 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368, the majority opinion of the court did not discuss the constitutional questions raised in the case at bar, and it appears that this court was justified in denying certiorari, since no federal questions were passed upon. Furthermore, there was a strong dissenting opinion filed in this case by McGehee, J. The Jackson case is not

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in point on the facts either, as the court there laid great stress on the pledge taken by members of the union involved, whereby they pledged themselves "at all times to bear true and faithful allegiance to the American Federation of State, County and Municipal Employees and to the labor movement in general." This pledge does not exist in the case at bar. Members of Local 549, on the other hand, are bound by Article III of the Constitution of the local to place their duties as members of the police force first, and their obligation as such members of the force is superior to any obligation to the union or any other organization.

The cases of Perez v. Board of Police Commissioners, City of Los Angeles, 178 Pac. (2d) 537, and Congress of Industrial Organizations v. City of Dallas, 198 S. W. (2d) 143, decided respectively by the District Court of Appeals, Second District, Division 1, of California, and by the Court of Civil Appeals of Texas, being decisions of intermediate appellate courts of those states, are certainly not such authorities as should foreclose this court from inquiring into the federal questions raised herein by appellants. Furthermore, the Dallas case is directly in conflict with the decision of the Missouri Supreme Court in the case of City of Springfield v. Clouse, supra, as the Court of Civil Appeals of Texas in the Dallas case upheld an ordinance which prohibited all officers and employees of the City of Dallas from belonging to any labor union, whether affiliated with an outside organization or not, and thus denied all such officers and employees their fundamental right to organize which the Missouri Court said all citizens have, including public officers and employees, subject to some regulation for the public welfare.

Appellees in their statement of suggestions making against the jurisdiction of this court cite Seattle High

School, Chapter No. 200, v. Sharples, 1930, 159 Wash. 424, 293 P. 994, 72 A. L. R. 1215; Frederick v. Owens, 1915, 35 Ohio Cir. Ct. R. 538; Hutchinson v. Magee, 1923, 278 Pa. 119, 122 A. 234; Carter v. Thompson, 1935, 164 Va. 312, 180 S. E. 410; McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N. E. 517, and Brownwell v. Russell, 76 Vt. 326, 57 A. 103. We are familiar with all these cases and have read them carefully. In none of them were the same constitutional questions raised and passed on as in the case at bar. Consequently they are not such authorities as should be even persuasive on the substantiality of the federal questions raised in this appeal.

Appellants respectfully submit that Rule 23, Section 342 of the Police Manual, is "a statute of a state" within the meaning of Sec. 237 (a) of the Judicial Code so that this Court has jurisdiction to review the judgment of the Supreme Court of Missouri upholding it; that the federal questions raised are substantial, and that this Court should accordingly take jurisdiction of this appeal.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 630

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, ET AL.,

Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION

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Attorney General of Missouri,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 630

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY AND FRANK DEMPSEY, FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER PATROLMEN, SERGEANTS AND TURNKEYS OF THE METROPOLITAN POLICE FORCE OF THE CITY OF ST. LOUIS, SIMILARLY SITUATED, *Appellants,*

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN AND ALOYS P. KAUFMANN, CONSTITUTING THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, *Appellees*

STATEMENT OF SUGGESTIONS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(a)

The Determination of This Cause by the Supreme Court of Missouri Did Not Involve the Sustention of the Validity of a "Statute of the State."

Appellants here are attacking the validity of a rule promulgated by the Board of Police Commissioners for

the City of St. Louis, Missouri, which reads as follows:

> "342. Other Organizations Forbidden—All members and employees of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employes other than the Police Relief Association, the Police Funeral Association and the St. Louis Police Pension Fund Association, each of which has been duly authorized to perform certain necessary functions."

The attack is bottomed upon the First and Fourteenth Amendments to the Federal Constitution, and it is claimed that jurisdiction to entertain this appeal is found in Section 237(a) of the Judicial Code of the United States, as amended, being Section 344(a) of Title 28 of the United States Code Annotated, reading as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

Appellees submit that this Court does not have jurisdiction of this appeal.

It appears from the record in this cause that the rule here under attack was promulgated by the Board of Police

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Commissioners of the City of St. Louis, Missouri, pursuant to authority delegated to that board under Section 7695, R. S. Mo. 1939. This statute reads in part as follows:

> "• • • The boards of police are hereby authorized to make all such rules and regulations, not inconsistent with this article, or other laws of the state, as they may judge necessary, for the appointment, employment, uniforming, discipline, trial and government of the police. The said boards shall also have power to require of any officer or policeman bond with sureties when they may consider it demanded by the public interests. All lawful rules and regulations of the board shall be obeyed by the police force on pain of dismissal or such lighter punishment, either by suspension, fine, reduction or forfeiture of pay, or otherwise as the boards may adjudge."

It is the contention of appellees that the rule so promulgated is not a "statute of the state" as that term is used in the Federal act conferring jurisdiction of appeals upon this Court. Concededly, this Court has entertained jurisdiction in cases involving the validity of acts of a legislative character, which were not, strictly speaking, "statutes." Of this nature are cases involving the validity of City ordinances, regulations promulgated under legislative delegation of authority by various boards, bureaus and commissions, etc. However, we think a different situation is presented in this case.

Members of the police force of the City of St. Louis, Missouri, are "officers of the state," and have been declared such by the General Assembly of the state. Section 7711, R. S. Mo. 1939, reads as follows:

> "The members of the police force of the cities covered by this article, organized and appointed by the police commissioners of said cities, are hereby declared to be officers of the said cities, under the charter and ordinances thereof, and also to be officers of

> the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said cities."

In supervising the activities of the organization, the Board of Police Commissioners of the City of St. Louis has been authorized to adopt necessary rules and regulations for the government and discipline of the members thereof. It was pursuant to this delegation of legislative authority that the rule under attack was adopted.

In all of the cases in which this Court has entertained jurisdiction to review the validity of rules and regulations of various political agencies of the state, one characteristic has been present that is not found here. This distinguishing characteristic was the fact that all of such other rules and regulations had the effect of "law" in that they were applicable to the citizens of the state in general. They affected the public and were not restricted nor limited in their application to the internal management and organization of a state agency. The present rule, by its terms, relates only to the Government and discipline of the members of a particular organization, who are state officers, and to whom we believe the state has a right to attach such qualifications for continuance in their appointments or employments as the public policy of the state may require. For this reason, we do not think that the rule is a "statute of the state" within the meaning of the Federal jurisdictional statute.

The cases cited by appellants in their statement suggesting the jurisdiction of this Court follow the general rule in declaring that rules having the characteristics of legislation and sanctioned by the lawmaking body of the state are "statutes of the state." Probably the case most closely approximating the precise facts involved in the present matter is that of *Hamilton* v. *Regents of the University of California, et al.*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197.

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At first glance, this case apparently holds that the order of the Board of Regents of the University of California was considered to be a statute of that state. However, viewing the substance of the litigation there involved, and referring to the state report of the decision of the highest court of California, it becomes apparent that in reality a true "statute" and constitutional provision of the State of California was involved. For that reason, we believe the case distinguishable and not authority for the proposition that the rule here under attack is a statute of the State of Missouri.

Appeal Should Be Dismissed Because There is No Substantial Federal Question

An appeal to this court will be dismissed if no substantial federal question is raised by the appeal. *Manhattan Life Ins. Co. of New York* v. *Cohen*, 234 U. S. 123, 136, 137, 34 S. Ct. 874, 58 L. Ed. 1245; *Campbell* v. *Olney*, 262 U. S. 352, 354, 43 S. Ct. 559, 67 L. Ed. 1021; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455, 456, 44 S. Ct. 197, 68 L. Ed. 382; *Roe* v. *State of Kansas ex rel Smith*, 278 U. S. 191, 193, 49 S. Ct. 160, 73 L. Ed. 259.

As was held by Mr. Chief Justice White in *Equitable Life Insurance Society* v. *Brown*, 187 U. S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190: "The doctrine • • • is that although • • • it be found that a question adequate substractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy" the cause will be dismissed.

The facts as shown by the petition and the decision of the state court in this case involves the right of a Board of Police Commissioners of St. Louis, Missouri which is a

state agency to make a rule that members of the police department of the City of St. Louis, who are officers of the state, shall not belong to a police union.

This identical question has been before this court twice before on petitions for writs of certiorari and in both cases the petitions were denied. *Fraternal Order of Police* v. *Harris,* 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781; *City of Jackson* v. *McLeod,* 328 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368.

Furthermore, this court in the case of *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91 L. Ed. 509, 67 S. Ct. 556, held that an act of Congress, i.e. the Hatch Act which prohibited the federal employees from participating in political activities, was proper and reasonable. In the course of the opinion this court, speaking through Mr. Justice Reed, had this to say:

• • • • • • •

"Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolute. • • • Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."

• • • • • • •

"• • • For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. • • •

"• • • The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When

> actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

Further, this court in Ex parte Curtis, 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed. 232, upheld the right of Congress to enact a law which forbade employees, who are not appointed by the President and confirmed by the Senate, from giving or receiving money for political purposes from or to the employees of the Government.

Also in *United States* v. *Wurzbach*, 280 U. S. 396, 50 S. Ct. 167, 74 L. Ed. 508, a law prohibiting members of Congress from receiving contributions for any political purpose whatsoever from any other federal employee was sustained.

While the *Mitchell, Curtis* and *Wurzbach* cases are not identical with the facts here in question, the principles enunciated in these cases are authority for such lack of jurisdiction.

Other questions that this court will take into consideration in determining whether a real or substantial question is involved and not just a frivolous moot question or whether there was a division in the opinion of the lower court and whether the opinions of the state courts of last resort are in accord as to the particular question. As was said in *Louisville and Nashville Railroad* v. *Melton*, 218 U. S. 30, 54 L. Ed. 921, 30 S. Ct. 676, l.c. 927:

> "• • • We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the

> subject and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, * * *"

A reading of the opinion in the state court discloses that there was no division of the court as to the constitutional questions involved.

The courts of all the states in which this same question has been presented have uniformly held that a rule prohibiting membership of policemen in a police union was proper and reasonable and violated no constitutional rights of the police. *Fraternal Order of Firemen* v. *Harris,* 306 Mich. 68, 10 N. W. 2d 310; *City of Jackson* v. *McLeod,* Miss., 24 So. 2d 319; *Perez* v. *Board of Police Commissioners, City of Los Angeles,* 178 P. 2d 537; *Congress of Industrial Organ.* v. *City of Dallas,* 198 S. W. 2d 143.

A like rule as to other governmental employees has been sustained without exception by the highest courts of other states. *Seattle High School, Chapter No. 200* v. *Sharples,* 1930, 159 Wash. 424, 293 P. 994, 72 A. L. R. 1215; *Frederick* v. *Owens,* 1915, 35 Ohio Cir. Ct. R. 538; *Hutchinson* v. *Magee,* 1923, 278 Pa. 119, 122 A. 234; *Carter* v. *Thompson,* 1935, 164 Va. 312, 180 S. E. 410; *McAuliffe* v. *Mayor of City of New Bedford,* 155 Mass. 216, 29 N. E. 517; *Brownwell* v. *Russell,* 76 Vt. 326, 57 A. 103.

In the case of *Fraternal Order of Police* v. *Harris*, 306 Mich. 68, 10 N. W. (2d) 310, 312, certiorari denied, 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781, the Court said:

> "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe: 'Nor can it be denied that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board.' "

In the case of *City of Jackson* v. *McLeod*, 199 Miss. 676, 24 So. (2d) 319, 321, certiorari denied, 328 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368, the Court said:

> "It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are liable to arise, which in turn may lead to disorders. • • • The police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, so far as their activities as policemen are concerned."

In the case of *McAuliffe* v. *Mayor, etc., of the City of New Bedford*, 155 Mass. 216, 29 N. E. 517, decided January 6, 1892, Justice Holmes in upholding a rule excluding police from political activity stated:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in

> which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

This statement of Justice Holmes was referred to in the recent case of *United Public Workers* v. *Mitchell, supra.* It is well to point out that restrictions upon the political activities of civil service employees of the city of St. Louis have been upheld, just as in its sphere, restrictions upon the political activities of Federal employees have been upheld. It is not a novel suggestion that when private citizens desire to enter the domain of public life, and hold public offices, whether appointive or elective, they forego some of the rights granted to them as private citizens under the Fourteenth Amendment of the Federal Constitution. 31 Am. Jur. 161; 41 Am. Jur. 937.

This Court has had before it in a previous case a like factual situation, *Hayman* v. *City of Galveston,* 273 U. S. 414, 71 L. Ed. 714, wherein the constitutionality of a regulation of the hospital board of the city of Galveston, Texas, was involved. This regulation provided that licensed osteopathic physicians could not practice in a city hospital. This Court, speaking through Mr. Justice Stone, said, l. c. 717:

> "• • • But the only protection claimed here is that of appellant's privilege to practice his calling. However extensive that protection may be in other situations, it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private prac-

tice of medicine. Compare Heim *v.* McCall, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287."

Again, in the case of *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497, this Court, through Mr. Justice Stone, said, l. c. 505:

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored. And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment. See Taylor & Marshall *v.* Beckham, 178 U. S. 548, 11 L. ed. 1187, 20 S. Ct. 890, 1009, supra, and authorities cited; Cave *v.* Missouri, 246 U. S. 650, 62 L. ed. 921, 38 S. Ct. 334, supra. Only once has it been contended here that an unlawful denial by state executive, administrative or legislative authority of the right to state office is for that reason alone a denial of equal protection. Wilson *v.* North Carolina, 169 U. S. 586, 42 L. Ed. 865, 18 S. Ct. 435. In rejecting that contention this Court said at pages 594, 595:
>
> " 'In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. . . .
>
> " 'Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.' "

It is settled that, upon application to this Court for review of a judgment of a State court, the burden is upon the petitioner to show affirmatively that this Court has jurisdiction. *Gorman* v. *Washington University*, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962; *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 852.

It is respondent's contention that under the previous decisions of this Court, as pointed out in the cases both Federal and State, that the Federal question sought to be injected in this case by appellants is without substance, and we respectfully submit that this Court should not take jurisdiction in this case.

J. E. Taylor,
Attorney General of the State of Missouri.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY and FRANK DEMPSEY, for and on Behalf of Themselves and All Other Patrolmen, Sergeants and Turnkeys of the Metropolitan Police Force of the City of St. Louis, Similarly Situated, Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN and ALOYS P. KAUFMANN, Constituting the Board of Police Commissioners of the City of St. Louis, Appellees.

No. 630.

Appeal from the Supreme Court of the State of Missouri.

APPELLANTS' PETITION FOR REHEARING.

Now come the appellants in the above entitled cause, and pray the Court to reconsider its decision rendered herein on the 15th day of March, 1948, dismissing the appeal herein, and for grounds therefor state:

The Court has overlooked the fact that appellants are denied the right to assemble and petition their state government and their superior officers for redress of their

grievances. The following is a simple illustration of many grievances that could be cited: deducting from appellants' pay sums of money for contribution to charitable organizations not connected with the police department, such deductions having been made without the consent of the employees, and regardless of the financial situation of their immediate families. This court has overlooked the fact that even the Missouri Supreme Court has stated in **City of Springfield v. Clouse**, 206 S. W. (2) 539, l. c. 542, that both officers and employees of the state, even judges of the Court, have the inherent right to assemble and petition the government; but that same Court, concurrently with its decision in the aforesaid case, has denied that right to the appellants, even though the Missouri Supreme Court holds said right to be inherent.

If appellants had been permitted to offer evidence in this case, they would have been able to show that organized police departments are not new or dangerous to the public welfare. The police of Washington, D. C., are authorized by statute to become members of unions, such as that involved here, which pledge themselves against strikes and other principles generally recognized as legitimate in ordinary labor unions. Act of Dec. 5, 1919, Section 1, Par. 9, 41 Stat. 364; Act of Jan. 24, 1920, Section 2, 41 Stat. 398. Appellants could also have shown that the entire membership of the police department of England and Scotland, commonly known as Scotland Yard, has belonged to a union since 1914, by statute. There never has been the slightest disloyalty of either of these organizations. Their reputations are above reproach.

The Missouri Supreme Court held, in **City of Springfield v. Clouse**, 206 S. W. (2) 539, l. c. 543, that state employees who belong to labor unions and who discuss their problems with their superiors, through representatives of their own choosing, are not engaged in collective bargaining as

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that term is generally understood. However, that right has been denied these appellants.

The very soul of our Democracy, as breathed into the Declaration of Independence, is contained in the first ten amendments to our Constitution and especially the guarantee that all citizens shall have the right to assemble and petition their government for the redress of their grievances. The denial of this right, even to a policeman, strikes at the very soul of the nation, and when it dies, American Democracy will perish.

This Court, in **United Public Workers v. Mitchell**, 330 U. S. 75, 91 L. Ed. 509, 67 S. Ct. 556, held the Hatch Act constitutional, and stated that said act was designed to protect governmental employees from political abuses. The appellants have no such protection in Missouri, however; they, the forgotten men of their city and state, are trying, through the union in question, to accomplish for themselves and their coemployees what the Hatch Act is accomplishing for the federal employees. They are trying through their union collectively to call to the attention of their state government and their fellow citizens the abuses which are frequently heaped upon them and which, as individuals, they are unable to fight.

The rule of the police commissioners is oppressive and tyrannical, and has relegated the employees of the department to a substandard of citizenship, which no real American can tolerate very long.

Appellants respectfully request the Court to reconsider its order dismissing the appeal herein, and to note probable jurisdiction of the appeal in this cause.

Respectfully submitted,

S. D. FLANAGAN,
E. D. FRANEY,
Attorneys for Appellants.

Certificate of Counsel.

S. D. Flanagan and E. D. Franey, attorneys for the appellants in the above entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay, and is believed by them to be meritorious.

S. D. Flanagan,
E. D. Franey,
Attorneys for Appellants.

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No. 630. KING ET AL. *v.* PRIEST ET AL. Appeal from the Supreme Court of Missouri. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE are of the opinion that probable jurisdiction should be noted. *S. D. Flanagan* and *E. D. Franey* for appellants. *J. C. Taylor,* Attorney General of Missouri, for appellees. Reported below: 357 Mo. 68, 206 S. W. 2d 547.